No. 99243-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHY ARLENE TURNER, individually and as the Personal Representative of the ESTATE OF KENT ALLEN TURNER, deceased,

Plaintiff/Appellant,

vs.

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES;
LEWIS MASON THURSTON AREA AGENCY ON AGING,

Defendants/Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen St.
Camas, WA 98607
(360) 852-3332

Daniel E. Huntington
WSBA No. 8277
422 W. Riverside, Suite 1300
Spokane, WA 99201
(509) 455-4201

On behalf of
Washington State Association for Justice Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the rights of persons seeking redress under the civil justice system.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves the breakdown of Washington's long-term care services program, resulting in the avoidable and tragic death of Kent Turner, a 52-year-old man suffering from severe multiple sclerosis. It presents the Court with an opportunity to examine the duties owed by the Department of Social and Health Services (DSHS) and Area Agencies on Aging (AAAs) to disabled persons who suffer injury or death while under their care and supervision. The facts are drawn from the parties' briefs. *See* Turner Op. Br. at 3-16; DSHS Resp. Br. at 3-18; LMT Resp. Br. at 4-22.

Kent Turner was diagnosed with multiple sclerosis (MS) in 2007 at the age of 45. By 2010, he was confined to a wheelchair, and soon lost the ability to perform routine tasks, including bathing, toileting and wheelchair transfers. Compounding these circumstances, his wife Kathy, who had been his primary caretaker, was diagnosed with cancer and had to undergo extensive treatment. Kent was forced to apply for assistance through DSHS.

DSHS caseworker Elizabeth Robinson conducted a Comprehensive Assessment Reporting Evaluation (CARE) of Kent on July 31, 2013. CAREs are used to evaluate clients for medical need and financial eligibility to receive long-term care services. Robinson concluded that Kent needed extensive assistance in many areas, including bathing, toileting, and dressing, and required residential, 24-hour care. On August 5, DSHS moved Kent to Puget Sound Health Care, a residential skilled nursing facility. Kent voiced his intent to remain there until he could return home with his wife.

Within two weeks of moving into Puget Sound, Kent was visited by his new DSHS caseworker, Kaya Wilcox. Wilcox described her job as relocating patients from nursing facilities to a "lesser level of care or something that could meet their needs, because it's very expensive to live in a nursing home." CP 1549. Kent reiterated that his intent was to remain in a skilled nursing facility until he could return home with Kathy.

Despite no apparent change in Kent's circumstances, Wilcox conducted follow-up assessments on 10/16/13 and 12/4/13. She did not alter any of Robinson's findings regarding Kent's functional ability made on 7/31/13. However, she did alter the living recommendation to "In-Home." CP 495. While Kent had previously expressed his intent to remain at Puget Sound until his wife recovered, after meeting with Wilcox, he agreed to move to a private apartment. He was moved to Capitol House Apartments

on February 18, 2014, where he received two, two-hour blocks of in-home care each day. For the remaining 20 hours, he was alone.

Wilcox was required to prepare an evacuation plan. Kent's plan provided his caregiver would ensure walkways were clear and his wheelchair batteries were charged, and would also assist him in an emergency. However, there is no evidence DSHS discussed an evacuation plan with Kent or provided him with a Life Alert device to call for help, and there was no plan for the 20 hours each day his caregiver was not present.

After Kent was moved to Capitol House, DSHS contracted with Lewis Mason Thurston Area Agency on Aging (LMT) to take over case management services. LMT assigned caseworker Heidi Hildebrandt to the case and hired ResCare to provide Kent's in-home care. Hildebrandt made a single visit to Kent's apartment. She didn't perform a follow-up CARE nor did she verify his ability to open the door or evacuate the apartment. LMT stated that it relied on DSHS's CARE assessment and that its role was to facilitate patient choice. No one from LMT ever visited Kent again.

Once at Capitol House, Kent was in severe distress and was unable to manage his basic needs. A friend who visited regularly frequently found Kent sitting in soiled clothes and stated that Kent tied a scarf around the doorknob in an effort to open it. A neighbor reported to DSHS that Kent had not showered in a month, was struggling to navigate his wheelchair,

and was losing weight because he lacked adequate food. DSHS notified LMT, but neither DSHS nor LMT took any action.

ResCare caregivers also reported concerns. One gave her notice when she arrived at the apartment to find Kent covered in feces and had difficulty cleaning him. A second stated that the fire department was called because Kent had fallen and could not get up. In fact, the fire department was called to aid Kent at least four times while he lived at Capitol House.

On April 14, 2014, Kent died alone in his apartment due to a fire of unknown origin. The Coroner determined his death was accidental. Kent had lived alone at Capitol House for less than two months.

Kent's estate sued DSHS and LMT, who successfully moved for summary judgment. This Court accepted the case for review.

III. ISSUES PRESENTED

(1) Did DSHS And LMT Have A Common Law Duty To Protect Kent Based On A Special Relationship Of Entrustment?

(2) Did DSHS's Recruitment Of Kent To Relocate Constitute An Affirmative Act Creating An Unreasonable Risk of Harm, Giving Rise To A Common Law Duty Of Reasonable Care?

(3) Did LMT Have A Common Law Duty Based On Its Voluntary Undertaking To Render Services To Kent?

IV. SUMMARY OF ARGUMENT

Washington's statutory and regulatory scheme governing long-term care services creates relationships that have relevance under Washington

common law. Here, DSHS and/or LMT owed Kent at least three common law duties. First, entrustment for a vulnerable person gives rise to a common law duty to protect. Defendants were entrusted with supervising Kent's care and were required to take reasonable precautions, within the scope of the relationship, to prevent foreseeable harm. Second, all persons have a duty to ensure their affirmative acts do not create an unreasonable risk of harm to others. DSHS's recruitment of Kent to move to Capitol House constituted an affirmative act creating an unreasonable risk of harm. Finally, by promising to render services to Kent in its contract with DSHS, and negligently performing the services such that it increased Kent's risk of harm, LMT is liable for harm arising from this increased risk.[1]

V. ARGUMENT

A. Brief Overview Of Washington's Statutory And Regulatory Scheme Governing Long-Term Care Services.

Title XIX of the Social Security Act establishes the federal Medicaid entitlement program. *See* 42 U.S.C. §§ 1396 *et seq.* (the "Medicaid Act").

[1] DSHS asserts a public duty doctrine defense. Turner does not urge abandonment of the doctrine, but notes questions surrounding its application. *See* Turner Motion to Transfer at 13-14. The doctrine is inapplicable to common law claims. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549-550, 442 P.3d 608 (2018). "Exceptions" to the doctrine that have developed since its inception are additional sources of duties. *See Ehrhart v. King County*, 195 Wn.2d 388, 400, 439 P.3d 612 (2020) (noting the exceptions "identify the most common instances when governments owe a duty to particular individuals"). Public entities are liable in tort to the same extent as private entities. *See* RCW 4.92.090. Plaintiffs should be able to assert any and all cognizable claims against public entities, whether under a statute, the common law, or an exception to the public duty doctrine.

The Medicaid Act directs states to establish long-term care services that ensure "the best interests of the recipients[.]" 42 U.S.C. § 1396a(a)(19).

The Washington Legislature adopted chapters 74.39 and 74.39A RCW to govern the provision of long-term care services. *See* Laws of 1989, ch. 427; Laws of 1993, ch. 508. These chapters balance a number of public policies, including quality of life, patient dignity, individual choice and cost. *See* RCW 74.39.005; RCW 74.39A.007. Fundamental among these policies is the safety of patients. *See, e.g.,* RCW 74.39.005(2) (stating "functional ability shall be the determining factor in defining long-term care services"); RCW 74.39A.090(1) (care options must focus on "the best interest of the patient or resident"); RCW 74.39A.051(6) ("the safety, health and well-being of residents shall be of paramount importance").

DSHS is tasked with administering long-term care services. *See* RCW 74.39A.007. Its comprehensive authority and responsibility include:

- conduct assessments of patients to determine whether and to what degree they need and qualify for long-term care services, *see* RCW 74.39A.040, WAC 388-106-0045 – 0140;
- coordinate the provision of services, *see* RCW 74.39A.007(1);
- case management during nursing care, *see* RCW 74.42.058;
- monitor discharge planning, *see* RCW 74.39A.040 & .090;
- develop a care plan, *see* RCW 74.39A.040(3)(b);
- contract with AAAs to provide case management services after discharge, *see* RCW 74.39A.090;
- monitor for quality the case management services provided by the AAA, *see* RCW 74.39A.090(4);
- resume case management if an AAA is unable or unwilling to fulfill its obligations, *see* RCW 74.39A.090(3).

DSHS adopted CARE to evaluate eligibility for services. *See* WAC 388-106-0045 – 0140. CAREs are based on assessment of patients' functional ability. *See* WAC 388-106-0125. CAREs are done yearly unless there is a significant change of circumstances. *See* WAC 388-106-0050(1).

DSHS must recommend a care plan based on its CARE assessment. *See* RCW 74.39A.040. Nursing home patients being particularly vulnerable, the statute provides that DSHS is to recommend in-home living only if it determines both that the nursing home patient prefers and "could live appropriately" in such a setting. *See* RCW 74.39A.040(3); *see also* RCW 74.39A.007(4) (discharge from nursing care "when appropriate"). DSHS must advise the client if it determines that he or she needs and prefers a nursing facility level of care. *See* RCW 74.39A.040(4)(a), (c).

If it determines discharge is safe, DSHS contracts with AAAs to provide case management services thereafter. *See* RCW 74.39A.090(2). However, DSHS retains responsibility for overseeing the quality of AAAs' case management. *See* RCW 74.39A.090(4)(a). If an AAA fails to fulfill its case management duties, DSHS may either obtain the services elsewhere or step in to manage the case itself. *See* RCW 74.39A.090(3)(a)-(b).

DSHS caseworkers must assess the "appropriateness" of home-based care "so that the resident and family can make informed choices."

RCW 74.42.058. AAAs must conduct home visits and telephone contacts to verify that DSHS's care plan "adequately meets the needs of the consumer." RCW 74.39A.095(1)(a) & (b). As mandatory reporters, caseworkers must report suspected abuse, neglect or self-neglect of their client. *See* RCW 74.34.035(1), (8); RCW 74.34.020(14), (21). If the caseworker has exhausted standard case management procedures and the placement still jeopardizes the patient's safety, due to, among other things, patient behaviors that are "substantially likely to cause serious harm" to him or her, the caseworker is to invoke the DSHS "challenging cases protocol." *See* WAC 388-106-1980; Turner Op. Br. at 32-33. This directs caseworkers to employ strategies specifically designed for difficult cases. After undertaking this additional step, if the danger is not resolved and the patient cannot be served safely, the caseworker may terminate the case. *Id.*

B. DSHS And LMT Were Entrusted With Kent's Protection, Giving Rise To A Common Law Duty To Protect Kent From Foreseeable Harm Arising Within The Scope Of The Special Relationship.

While there is generally no duty to prevent harm to another, a duty arises when there is a special relationship between a defendant and a victim of harm. *See Restatement (Second) of Torts* §§ 314A (1965); *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 276-77, 428 P.3d 1197 (2018). This special relationship creates a duty to protect the other from risks of

harm that arise "in the course of that relation." Section 314A cmt. c. Within the scope of the relationship, the defendant has a duty to protect the other against "all reasonably foreseeable harm," *Hendrickson*, 192 Wn.2d at 277, including "risks arising out of the actor's own conduct. . . or from the negligence of the plaintiff himself." Section 314A cmt. d. It encompasses a variety of harms, such as dangerous instrumentalities, *see Hendrickson*, 192 Wn.2d at 277-78 (table saw); self-inflicted harm, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (suicide); *Hunt v. King County*, 4 Wn. App. 12, 22-23, 481 P.2d 593 (1971) (similar); and illness, *see Shea v. City of Spokane*, 17 Wn. App. 236, 562 P.2d 264 (1977).

A duty to protect exists where the defendant is entrusted with the protection of a vulnerable person. *H.B.H. v. State*, 192 Wn.2d 154, 172, 429 P.3d 484 (2018) ("entrustment and vulnerability . . . are at the heart of the special relationship"); *id.*, 192 Wn.2d at 173 ("the common thread running through § 315 and its related provisions, §§ 314A and 320, is the notion of vulnerability and entrustment"). The duty is "protective in nature, historically involving an affirmative duty to render aid." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991) (citation omitted). It is based on the responsible party's assumption of responsibility for the safety of another, and is typically supervisory or custodial. *See Caulfield v. Kitsap County*, 108 Wn. App. 242, 255, 29 P.3d 738 (2001).

The law is moving "toward a recognition of the duty to aid or protect in any relation of dependence or mutual dependence." Section 314A cmt. b.

The degree of supervisory authority or control informs the scope of special relationship duties. *See Volk v. DeMeerleer*, 187 Wn.2d 241, 264-65, 386 P.3d 254 (2016) (examining *Restatement (Second) of Torts* § 315 (1965) and recognizing "diverse levels of control give rise to corresponding degrees of responsibility").[2] In the context of the duty to control under § 315(a),[3] this Court has found a duty to warn where a defendant's expertise combined with his relation to another provides him with "unique insight" into a risk of harm. *See Volk,* 187 Wn.2d at 265-66. In *Volk*, the Court considered whether a psychiatrist owed a tort duty under § 315(a) to the estate of a murder victim killed by his patient. The defendant argued § 315 required the same control as that under the related *Restatement (Second) of Torts* § 319 (1965). The Court disagreed. Examining *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983), the Court found a duty based not on the

[2] This Court has examined § 314A in relation to §§ 315 & 320 (1965). *See H.B.H.,* 192 Wn.2d at 171 (examining the prerequisites for the "related duties" of §§ 314A, 315 & 320). Sections 315 & 320 (1965) embody special protective relationships and are related to § 314A, but concern protection from harm posed by a third party.

[3] Based on the common underpinnings of the duties under § 315 to control (based on a relationship with a dangerous third party) and protect (based on a relationship with a vulnerable victim), the Court often examines the nature of one by reference to jurisprudence addressing the other. *See H.B.H.,* 192 Wn.2d at 173; *Volk*, 187 Wn.2d at 265. In either case, a duty reflects a policy determination that there is "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *See* W. Page Keeton et al., Prosser and Keeton on Torts § 56, at 374 (5th ed. 1984).

control required under § 319, but rather on the doctor's expertise combined with his relationship to the other, which gave him "unique insight" into potential harm and placed him in a "distinct position" to prevent harm by warning of the danger:

> [O]nce a special relationship is formed (one that is definite, established, and continuing), a duty exists without regard for the "control" principle guiding the § 319 take charge cases. . . . [T]he nature of the relationship in *Petersen* gave the doctor unique insight into the potential dangerousness of his patient as well as the identity of potential victims. While other individuals may have been aware of his patient's actions, *the doctor's relationship to his patient, combined with his professional knowledge, allowed him to stand in the distinct position of being able to mitigate or prevent the dangerousness* of his patient and the ability to *"take whatever steps [were] necessary under the circumstances, including possibly warning the intended victim or notifying law enforcement officials."*

Id., 187 Wn.2d at 261 (brackets and emphasis added). In *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 398 P.2d 14 (1965), a doctor who failed to warn his patient that prescribed medication could cause drowsiness owed a duty to the plaintiff, who was injured when the patient fell asleep while driving and caused an accident. In *Volk* and *Kaiser,* the doctors' relationship with the other, combined with their expertise, enabled them to, at minimum, provide a warning that may protect potential victims from foreseeable harm.

Washington courts have frequently found special relationships between caseworkers and their clients. *See H.B.H. v. State, supra; Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992); *Caulfield*, 108 Wn. App. at

251-56. In *Caulfield*, cited with approval by this Court in *H.B.H.*, a special relationship was found between DSHS & AAA caseworkers and their client who, like Kent, was in long-term care due to severe multiple sclerosis. The court observed: "Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent not only on their caregivers but also their case managers for their personal safety." *Caulfield*, 108 Wn. App. at 255-56. It noted several duties indicating the caseworkers had been entrusted with the protection of their client, including responsibilities to establish and monitor a care plan, provide crisis management, conduct assessment visits, and terminate in-home care "if it was inadequate to meet [the client's] needs." *Id.*, 108 Wn. App. at 256.[4]

Here, the relationships created by the statutory and regulatory scheme, as well as the contract between DSHS and LMT, involve sufficient entrustment and control to trigger a special relationship. For its part, DSHS was entrusted with the initial responsibility of assessing Kent's needs and risks and recommending a care plan based on that assessment. Similar to *Volk* and *Kaiser*, that should include a duty to offer an honest and

[4] In *Caulfield*, these considerations gave rise to a duty under § 315 to protect Caulfield from a third person. In *Turner*, those same considerations give rise to a duty on the part of DSHS and LMT under § 314A to protect Kent. In *Donohoe v. State*, 135 Wn. App. 824, 142 P.2d 654 (2006), the court did not disagree with *Caulfield*, but reached a contrary conclusion based on the facts. There, a patient's personal representative sued DSHS for injuries the patient suffered while in a nursing facility. The claim appeared to focus primarily on DSHS's role in ensuring nursing home regulatory compliance. To the extent *Donohoe* can be read to conflict with *Caulfield* and *H.B.H.*, it should be disapproved.

independent recommendation, based on knowledge and experience, as to whether in-home living would be unsafe. It was also required to create an evacuation plan. Finally, DSHS had the responsibility to oversee LMT's case management, and in the event it did not fulfill its obligations, to provide the services itself.[5] *See* RCW 74.39A.090(3)(b).

Once Kent was placed, Defendants had an obligation to monitor his safety, verify his needs were met and modify as needed. They were to ensure safe evacuation and could have provided a Life Alert device. If Kent's safety were at risk, and the risk could not be mitigated through ordinary case management, they were to invoke the challenging cases protocol, and terminate the case if the dangerous situation could not be remedied.

Defendants insist they had no duty because Kent chose in-home living. However, Kent's so-called "decision" cannot relieve Defendants of their *independent* duty to protect Kent, which includes offering an independent recommendation that does not elevate cost or expediency over safety. In general, one who has a duty to provide material information is not relieved of the duty by a subsequent act taken on the basis of the incomplete information. *See, e.g., Tyner v. State,* 141 Wn.2d 68, 83-84, 1 P.3d 1148

[5] In this respect, in addition to constituting a breach of the general duty to protect under *Restatement* § 314A against all foreseeable harm, DSHS's failure to intervene and prevent harm stemming from LMT's negligent case management should also qualify as breach of the duty to protect against third party harm contemplated under *Restatement* § 315(b).

(2000) (court order not a superseding cause if based on caseworker's failure to disclose material information). A caseworker's assessment is a material fact that must be disclosed. *See id.,* 141 Wn.2d at 87 (caseworker judgment as to merits of child abuse allegation was material because it was "a fact that might have been relied upon by the court in making its decision").

Ultimately, Defendants misapprehend the nature of their protective duty. Defendants were obligated to protect Kent within the scope of the relationship. Their expertise, combined with their relationship to Kent, gave them "unique insight" into potential risks and placed them in a "distinct position" to mitigate harm through a thorough and honest recommendation, followed by similar warnings if safety concerns arose after placement. *See Volk,* 187 Wn.2d at 266. Defendants were best situated to assess Kent's needs and anticipate risks. Yet they downplayed the risks, giving him a false sense of security. DSHS cannot rely on Kent's "choice" if it used its position to manipulate this "choice." *Cf. Travis v. Bohannon,* 128 Wn. App. 231, 243, 115 P.3d 342 (2005) (school's duty to student injured on field trip not relieved by parent permission, as the jury could find permission "was not independent of the District's negligence . . . [because] the District lulled the mother into false complacency about the hazards" (brackets added)). Additionally, they were to take reasonable steps for safe evacuation. If Defendants can establish that they satisfied these duties, or that Kent would

have chosen in-home living regardless, liability may be inappropriate. But these are fact questions not amenable to summary judgment.[6]

C. DSHS's Recruitment Of Kent For Relocation Constituted An Affirmative Act Creating An Unreasonable Risk Of Harm, And DSHS Had A Duty To Exercise Reasonable Care To Prevent Harm To Kent Arising Out Of This Affirmative Act.

Washington law recognizes that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011) (citations omitted). Such "affirmative acts" are not merely evidence of breach; they are duty-triggering events. *See Robb v. City of Seattle*, 176 Wn.2d 427, 434, 295 P.3d 212 (2013) (citing *Restatement (Second) of Torts* § 314 cmt. a (1965)). One who does an affirmative act has a "duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." *Id.* at 436 (quoting § 302 cmt. a (1965)); *see also Washburn v. City of Federal Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013) (recognizing actors "have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts" (citing

[6] Kent's relationship with DSHS appears to also meet the special relationship exception to the public duty doctrine, which requires privity or direct contact, express assurances, and justifiable reliance. *See Babcock v. Mason County Fire Dist. No. 6,* 144 Wn.2d 774, 30 P.3d 1261 (2001). Privity is met where the defendant has contact with the plaintiff such that he is set apart from the general public. *See Caulfield,* 108 Wn. App. at 252. Express assurances are satisfied by the provision of case management, *see id.*, 108 Wn. App. at 252, and should also be met by Wilcox's recommendation to Kent that he could live independently. Whether Kent relied on her assurance in agreeing to relocate, and whether her conduct caused his death, are questions of fact not appropriate for summary judgment.

Restatement (Second) of Torts § 281 cmts. c, d)); *Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 550, 442 P.3d 608 (2019) (citing § 281 cmt. e).

The risk arising from one's affirmative act may originate from a variety of sources, including "the foreseeable action of the other." *See Restatement* § 302(b). An actor's conduct may be harmless on its own, but if the actor should anticipate that the situation will become dangerous if acted upon by the other, the actor has a duty to avoid resultant harm:

> d. *Probability of intervening action.* If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being...the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings...In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being...as customary or normal, the actor is required to anticipate and provide against it. The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation. (See § 303.)

Section 302 cmt. d (citing *Restatement (Second) of Torts* § 303 (1965)).

DSHS's recruitment of Kent to move to Capitol House falls within the duty under *Robb, Washburn, Beltran-Serrano* and *Restatement* §§ 281, 302 & 303.[7] While Kent expressed general interest in eventually moving,

[7] Turner argues that DSHS breached its duty contemplated by *Robb*, 176 Wn.2d at 437-38, "not to affirmatively create a new risk." Turner Reply Br. at 10. *Robb* analyzes the duty related to § 302 presented here. Plaintiff also cites *Washburn* and *Restatement (Second) of Torts* § 281 (1965). *See* Turner Op. Br. at 25 n.12. Section 303, involving acts intended to

he also stated his intent to remain in skilled nursing or assisted living until he could return home. Plaintiff alleges that to reduce cost, Wilcox recruited Kent to move to home-based living with inadequate assistance. DSHS's July 2013 findings regarding Kent's needs, which determined his need for full-time care, were unchanged in the subsequent assessments recommending Kent for in-home living. Had he not been recruited by Wilcox, a caseworker in whom he placed his trust, and had she not altered her recommendation, Kent would not have moved to Capitol House.

As Kent's professional caseworker, Wilcox knew or should have known "the habits and propensities of human beings," like Kent, who may aspire to live independently. *See Restatement* § 302 cmt. d. She should have anticipated that the "customary or normal" reaction of an adult to being told by his caseworker that he would be safe in a private apartment would be to rely on this assessment. Yet Wilcox offered an assessment that prioritized cost over safety. In so doing, she created a situation in which Kent would choose the option she urged and that was "likely to be dangerous." *Id.* She was required, therefore, to "anticipate and provide against it." *Id.*

D. LMT Volunteered To Render Case Management Services That It Knew Were Necessary For Kent's Protection, And It Thus Owed A Duty To Kent Under *Restatement (Second) of Torts* § 323 (1965) and *Restatement (Third) of Torts* § 42 (2012).

affect or likely to affect the conduct of another, is a related *Restatement* section to § 302. *See* § 303 cmt. a.

Washington has adopted *Restatement (Second) of Torts* § 323 (1965). *See Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975). *Restatement (Third) of Torts* § 42, cited with approval in *Mita v. Guardsmark,* LLC, 182 Wn. App. 76, 328 P.3d 962 (2014), "retains the core features of § 323, and replaces it." Under this theory, one who "gratuitously or for consideration" renders services that she should recognize as being necessary for another's protection has a duty to use reasonable care to ensure her undertaking does not increase the risk of harm to the other.

Two aspects of the tort warrant attention. First, the actor's skill and competence are relevant to the existence and scope of duty. One who should realize that a promise "may carry with it a profession or representation of some skill and competence" has a duty commensurate with the representation of competence and the other's reasonable reliance thereon. *See Restatement (Second)* § 323 cmt. b. Second, this affirmative duty is distinct from the duty to not *create* a risk of harm and encompasses both acts of omission and acts of commission. *See* § 42 cmt. c (contrasting the ordinary duty of reasonable care under *Restatement (Third) of Torts* § 7 and the affirmative duty imposed under § 42); *Brown,* 86 Wn.2d at 300-01. Thus, one may face liability for harm "arising from other risks when the actor undertakes to eliminate or ameliorate those risks." Section 42 cmt. c.

A party owes a duty of care under this doctrine if the actor 1) knows or should know the other is in need of protection, 2) voluntarily undertakes to render services, and 3) her conduct increases the risk of harm beyond that which existed without the undertaking. *See Mita,* 182 Wn. App. at 85; *Restatement (Second) of Torts* § 323; *Restatement (Third) of Torts* § 42.[8]

Here, LMT knew or should have known that its services were necessary for his safety. It was aware Kent was "functionally disabled," and thus "dependent on others for direct care, support, supervision, or monitoring to perform activities of daily living." RCW 74.39A.009(23). It also had ample notice he was in distress after moving to Capitol House.

Second, LMT agreed to render the services enumerated in its contract, which included obligations to "assess the quality of the in-home care services provided," RCW 74.39A.090(5) and be in regular in contact with Kent to verify the care plan met his needs. RCW 74.39A.095(1)(b).

Finally, LMT's negligent rendering of services increased the risk of harm to Kent beyond that which would have existed without the undertaking. This element is met if the promise induces one to "refrain from

---

[8] The *Restatements* suggest increased risk may not be necessary. *See Restatement (Second)* § 323 cmt. e; *Restatement (Third)* § 42 cmt. f. Section 323 cmt. e opines:

> [I]t is possible that a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and let him drown, is liable even though there were no other possible sources of aid, and the situation is made no worse than it was.

(Brackets added).

seeking help elsewhere." *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998). If one conveys to another the impression that the danger is less imminent than it is, causing the other to refrain from offering aid, this satisfies the "increased risk" requirement. *See Brown,* 86 Wn.2d at 299.

Here, there was substantial evidence that Kent was deteriorating and in distress after his relocation, a fact about which LMT had notice. DSHS was in a position to supervise LMT, and step in if necessary to ensure Kent's safety. If LMT caused DSHS to refrain from protecting Kent, such as by indicating to DSHS it would mitigate the risk of harm to Kent, this should be sufficient to create a genuine issue of material fact as to increased risk. Reliance is "a factual question not generally amenable to summary judgment." *Mita,* 182 Wn.2d at 86 (citation omitted).

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 25th day of January, 2021.

for Valerie D. McOmie

Daniel E. Huntington

On behalf of WSAJ Foundation

Appendix

RCW 74.39A.040

RCW 74.39A.080

RCW 74.39A.090

RCW 74.39A.095

RCW 74.42.058

WAC 388-106-1980

Restatement (Second) of Torts § 281 (1965)

Restatement (Second) of Torts § 302 (1965)

Restatement (Second) of Torts § 303 (1965)

Restatement (Second) of Torts § 314A (1965)

Restatement (Second) of Torts § 315 (1965)

Restatement (Second) of Torts § 320 (1965)

Restatement (Second) of Torts § 323 (1965)

Restatement (Third) of Torts § 42 (2012)

RCW 74.39A.040

Department assessment of and assistance to hospital patients in need of long-term care.

The department shall work in partnership with hospitals in assisting patients and their families to find long-term care services of their choice. The department shall not delay hospital discharges but shall assist and support the activities of hospital discharge planners. The department also shall coordinate with home health and hospice agencies whenever appropriate. The role of the department is to assist the hospital and to assist patients and their families in making informed choices by providing information regarding home and community options to individuals who are hospitalized and likely to need long-term care.

(1) To the extent of available funds, the department shall assess individuals who:

(a) Are medicaid clients, medicaid applicants, or eligible for both medicare and medicaid; and

(b) Apply or are likely to apply for admission to a nursing facility.

(2) For individuals who are reasonably expected to become medicaid recipients within one hundred eighty days of admission to a nursing facility, the department shall, to the extent of available funds, offer an assessment and information regarding appropriate in-home and community services.

(3) When the department finds, based on assessment, that the individual prefers and could live appropriately and cost-effectively at home or in some other community-based setting, the department shall:

(a) Advise the individual that an in-home or other community service is appropriate;

(b) Develop, with the individual or the individual's representative, a comprehensive community service plan;

(c) Inform the individual regarding the availability of services that could meet the applicant's needs as set forth in the community service plan and explain the cost to the applicant of the available in-home and community services relative to nursing facility care; and

(d) Discuss and evaluate the need for ongoing involvement with the individual or the individual's representative.

(4) When the department finds, based on assessment, that the individual prefers and needs nursing facility care, the department shall:

(a) Advise the individual that nursing facility care is appropriate and inform the individual of the available nursing facility vacancies;

(b) If appropriate, advise the individual that the stay in the nursing facility may be short term; and

(c) Describe the role of the department in providing nursing facility case management.

[1995 1st sp.s. c 18 § 6.]

NOTES:

Conflict with federal requirements—Severability—Effective date—1995 1st sp.s. c 18: See notes following RCW **74.39A.030**.

RCW 74.39A.080

Department authority to take actions in response to noncompliance or violations.

(1) The department is authorized to take one or more of the actions listed in subsection (2) of this section in any case in which the department finds that a provider of assisted living services, adult residential care services, or enhanced adult residential care services has:

(a) Failed or refused to comply with the requirements of this chapter or the rules adopted under this chapter;

(b) Operated without a license or under a revoked license;

(c) Knowingly, or with reason to know, made a false statement of material fact on his or her application for license or any data attached thereto, or in any matter under investigation by the department; or

(d) Willfully prevented or interfered with any inspection or investigation by the department.

(2) When authorized by subsection (1) of this section, the department may take one or more of the following actions:

(a) Refuse to issue a contract;

(b) Impose reasonable conditions on a contract, such as correction within a specified time, training, and limits on the type of clients the provider may admit or serve;

(c) Impose civil penalties of not more than one hundred dollars per day per violation;

(d) Suspend, revoke, or refuse to renew a contract; or

(e) Suspend admissions to the facility by imposing stop placement on contracted services.

(3) When the department orders stop placement, the facility shall not admit any person admitted by contract until the stop placement order is terminated. The department may approve readmission of a resident to the facility from a hospital or nursing home during the stop placement. The department shall terminate the stop placement when: (a) The violations necessitating the stop placement have been corrected; and (b) the provider exhibits the capacity to maintain correction of the violations previously found deficient. However, if upon the revisit the department finds new violations that the department reasonably believes will result in a new stop placement, the previous stop placement shall remain in effect until the new stop placement is imposed.

After a department finding of a violation for which a stop placement has been imposed, the department shall make an on-site revisit of the provider within fifteen working days from the request for revisit, to ensure correction of the violation. For violations that are serious or recurring or uncorrected following a previous citation, and create actual or threatened harm to one or more residents' well-being, including violations of residents' rights, the department shall make an on-site revisit as soon as appropriate to ensure correction of the violation. Verification of correction of all other violations may be made by either a department on-site revisit or by written or photographic documentation found by the department to be credible. This subsection does not prevent the department from enforcing license suspensions or revocations. Nothing in this subsection shall interfere with or diminish the department's authority and duty to ensure that the provider adequately cares for residents, including to make departmental on-site revisits as needed to ensure that the provider protects residents, and to enforce compliance with this chapter.

(4) Chapter **34.05** RCW applies to department actions under this section, except that orders of the department imposing contracts suspension, stop placement, or conditions for continuation of a contract are effective immediately upon notice and shall continue pending any hearing.

RCW 74.39A.090

Discharge planning—Contracts for case management services and reassessment and reauthorization—Assessment of case management roles and quality of in-home care services—Plan of care model language.

(1) Discharge planning, as directed in this section, is intended for residents and patients identified for discharge to long-term services under RCW **70.41.320**, **74.39A.040**, or **74.42.058**. The purpose of discharge planning is to protect residents and patients from the financial incentives inherent in keeping residents or patients in a more expensive higher level of care and shall focus on care options that are in the best interest of the patient or resident.

(2) The department shall, consistent with the intent of this section, contract with area agencies on aging:

(a) To provide case management services to consumers receiving home and community services in their own home; and

(b) To reassess and reauthorize home and community services in home or in other settings for consumers:

(i) Who have been initially authorized by the department to receive home and community services; and

(ii) Who, at the time of reassessment and reauthorization, are receiving home and community services in their own home.

(3) In the event that an area agency on aging is unwilling to enter into or satisfactorily fulfill a contract or an individual consumer's need for case management services will be met through an alternative delivery system, the department is authorized to:

(a) Obtain the services through competitive bid; and

(b) Provide the services directly until a qualified contractor can be found.

(4)(a) The department shall include, in its oversight and monitoring of area agency on aging performance, assessment of case management roles undertaken by area agencies on aging in this section. The scope of oversight and monitoring includes, but is not limited to, assessing the degree and quality of the case management performed by area agency on aging staff for elderly and persons with disabilities in the community.

(b) The department shall incorporate the expected outcomes and criteria to measure the performance of service coordination organizations into contracts with area agencies on aging as provided in chapter **70.320** RCW.

(5) Area agencies on aging shall assess the quality of the in-home care services provided to consumers who are receiving services under programs authorized through the medicaid state plan, medicaid waiver authorities, or similar state-funded in-home care programs through an individual provider or home care agency. Quality indicators may include, but are not limited to, home care consumers satisfaction surveys, how quickly home care consumers are linked with home care workers, and whether the plan of care under RCW **74.39A.095** has been honored by the agency or the individual provider.

(6) The department shall develop model language for the plan of care established in RCW **74.39A.095**. The plan of care shall be in clear language, and written at a reading level that will ensure the ability of consumers to understand the rights and responsibilities expressed in the plan of care.

[2018 c 278 § 11; 2013 c 320 § 10; 2004 c 141 § 3; 1999 c 175 § 2; 1995 1st sp.s. c 18 § 38.]

NOTES:

Findings—Intent—2018 c 278: See note following RCW **74.39A.500**.

Findings—1999 c 175: "(1) The legislature finds that the quality of long-term care services provided to, and protection of, Washington's low-income elderly and disabled residents is of great importance to the state. The legislature further finds that revised in-home care policies are needed to more effectively address concerns about the quality of these services.

(2) The legislature finds that consumers of in-home care services frequently are in contact with multiple health and long-term care providers in the public and private sector. The legislature further finds that better coordination between these health and long-term care providers, and case managers, can increase the consumer's understanding of their plan of care, maximize the health benefits of coordinated care, and facilitate cost efficiencies across health and long-term care systems." [**1999 c 175 § 1**.]

Conflict with federal requirements—Severability—Effective date—1995 1st sp.s. c 18: See notes following RCW **74.39A.030**.

RCW 74.39A.095

Case management services—Duties of the area agencies on aging—Consumers' plans of care—Notification to consumer directed employer.

(1) In carrying out case management responsibilities established under RCW **74.39A.090** for consumers who are receiving services under programs authorized through the medicaid state plan, medicaid waiver authorities, or similar state-funded in-home care programs, to the extent of available funding, each area agency on aging shall:

(a) Work with each client to develop a plan of care under this section that identifies and ensures coordination of health and long-term care services and supports. In developing the plan, the area agency on aging shall use and modify as needed any comprehensive plan of care developed by the department as provided in RCW **74.39A.040**;

(b) Monitor the implementation of the consumer's plan of care to verify that it adequately meets the needs of the consumer through activities such as home visits, telephone contacts, and responses to information received by the area agency on aging indicating that a consumer may be experiencing problems relating to his or her home care;

(c) Reassess and reauthorize services;

(d) Explain to the consumer that consumers have the right to waive case management services offered by the area agency on aging, except consumers may not waive the area agency on aging's reassessment or reauthorization of services, or verification that services are being provided in accordance with the plan of care; and

(e) Document the waiver of any case management services by the consumer.

(2) Each consumer has the right to direct and participate in the development of their plan of care to the maximum extent practicable, and to be provided with the time and support necessary to facilitate that participation.

(3) As authorized by the consumer, a copy of the plan of care may be distributed to: (a) The consumer's individual provider contracted with the department; (b) the entity contracted with the department to provide personal care services; and (c) other relevant providers with whom the consumer has frequent contact.

(4) If an individual provider is employed by a consumer directed employer, the department or area agency on aging must notify the consumer directed employer if:

(a) There is reason to believe that an individual provider or prospective individual provider is not delivering or will not be able to deliver the services identified in the consumer's plan of care; or

(b) The individual provider's performance is jeopardizing the health, safety, or well-being of a consumer receiving services under this section.

[**2018 c 278 § 12**; **2014 c 40 § 1**; **2012 c 164 § 507**. Prior: **2011 1st sp.s. c 31 § 14**; **2011 1st sp.s. c 21 § 5**; **2009 c 580 § 8**; **2004 c 141 § 1**; **2002 c 3 § 11** (Initiative Measure No. 775, approved November 6, 2001); **2000 c 87 § 5**; **1999 c 175 § 3**.]

NOTES:

Findings—Intent—2018 c 278: See note following RCW **74.39A.500**.

RCW 74.42.058

Department case management services.

(1) To the extent of available funding, the department shall provide case management services to assist nursing facility residents, in conjunction and partnership with nursing facility staff. The purpose of the case management services is to assist residents and their families to assess the appropriateness and availability of home and community services that could meet the resident's needs so that the resident and family can make informed choices.

(2) To the extent of available funding, the department shall provide case management services to nursing facility residents who are:

(a) Medicaid funded;

(b) Dually medicaid and medicare eligible;

(c) Medicaid applicants; and

(d) Likely to become financially eligible for medicaid within one hundred eighty days, pursuant to RCW **74.42.057**.

[**1995 1st sp.s. c 18 § 9.**]

NOTES:

Conflict with federal requirements—Severability—Effective date—1995 1st sp.s. c 18: See notes following RCW **74.39A.030**.

HTML has links - PDF has Authentication

PDF **WAC 388-106-1980**

When may the department terminate or deny MAC or TSOA services?

(1) The department will deny or terminate MAC or TSOA services if you are not eligible for services pursuant to WAC **388-106-1905**, **388-106-1910**, and **388-106-1945**.

(2) The department may deny or terminate your MAC or TSOA services if, after exhaustion of standard case management activities and the approaches delineated in the department's challenging cases protocol that must include an attempt to reasonably accommodate your disability or disabilities, one or more of the following conditions exist:

(a) Your rights and responsibilities as a client of the department are reviewed with you by a department representative under WAC **388-106-1300** and **388-106-1303**, and you refuse to accept those services identified in your care plan that are vital to your health, welfare, or safety.

(b) You choose to receive services in your own home and you or others in your home demonstrate behaviors that are substantially likely to cause serious harm to you or your care provider.

(c) You choose to receive services in your own home and hazardous conditions in or immediately around your home jeopardize the health, safety, or welfare of you or your provider. Hazardous conditions include but are not limited to the following:

(i) Threatening, uncontrolled animals (such as dogs);

(ii) The manufacture, sale, or use of illegal drugs;

(iii) The presence of hazardous materials (such as exposed sewage, evidence of a methamphetamine lab).

(3) The department may terminate services if the department does not receive consent of the care plan within sixty days of the completion of your care plan. Written consent for step one and step two care plans may be provided by secure email or other electronic means.

[Statutory Authority: RCW **74.08.090**. WSR 18-08-033, § 388-106-1980, filed 3/27/18, effective 4/27/18.]

Restatement (Second) of Torts § 281 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 1. The Elements of a Cause of Action for Negligence

§ 281 Statement of the Elements of a Cause of Action for Negligence

The actor is liable for an invasion of an interest of another, if:

(a) the interest invaded is protected against unintentional invasion, and

(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and

(c) the actor's conduct is a legal cause of the invasion, and

(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

See Reporter's Notes.

Comment:

a. Clauses (a) and (b) state the conditions necessary to make the actor's conduct negligent. Clauses (c) and (d) state the conditions which are necessary to make negligent conduct actionable.

Comment on Clause (a):

b. This Clause states the requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions. The extent to which particular interests are protected is considered in those Chapters which deal with the various interests, and no catalogue is here given of the interests which are protected against unintentional invasions and those which are not so protected.

Comment on Clause (b):

c. Risk to class of which plaintiff is member. In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

Illustrations:

1. A, a passenger of the X Railway Company, is attempting to board a train while encumbered with a bulky and apparently fragile package. B, a trainman of the Company, in assisting A, does so in such a manner as to make it probable that A will drop the package. A drops the package, which contains fireworks, although there is nothing in its appearance to indicate it. The fireworks explode. The force of the explosion knocks over a platform scale thirty feet away, which falls upon C, another passenger waiting for a train, and injures her. X Railway Company is not liable to C.

2. A is driving a car down the street. He drives so carelessly that he collides with another car. The second car contains dynamite. A is ignorant of this and there is nothing in its appearance or in the circumstances to give him reason to suspect it. The collision causes an explosion which shatters a window of a building on an intersecting street, half a block away, inflicting serious cuts upon B, who is working at a nearby desk. The explosion also harms C, who is walking on the sidewalk near the point where the collision occurs. It also shatters the windows in the building opposite, injuring D at work therein. A is not negligent toward B, since he had no reason to believe that his conduct involved any risk of harming anyone at the point where B is injured. A is negligent toward C since he should have realized that careless driving might result in an accident which would affect the safety of those traveling upon the sidewalk, and the fact that the harm occurred in a different manner from that which might have been expected does not prevent his negligence from being in law the cause of the injury. Whether or not A is negligent toward D depends upon whether A as a reasonable man should have expected that the manner in which he drove the car might cause harm to persons in D's situation.

Comment:

d. There are situations in which the obvious probability of harm to one class of persons may be considered in determining whether an act is negligent to a person of a different class, although the risk of harm to persons of the latter class is so slight that the actor's conduct might otherwise not be negligent as to them. (See § 294.)

e. The hazard problem. Conduct is negligent because it tends to subject the interests of another to an unreasonable risk of harm. Such a risk may be made up of a number of different hazards, which frequently are of a more or less definite character. The actor's negligence lies in subjecting the other to the aggregate of such hazards. In other words, the duty established by law to

refrain from the negligent conduct is established in order to protect the other from the risk of having his interest invaded by harm resulting from one or more of this limited number of hazards.

In some cases the duty to refrain from certain conduct may be established solely to protect the other from the risk of harm arising from one particular hazard. As to harm resulting from that hazard, the conduct is negligent. Thus in some situations the locking of a securely closed door may be required only for the purpose of protecting goods within the room or building from the risk of theft. When the thief appears on the scene, opens the unlocked door, and steals the goods within, the harm which results is the precise harm which the duty to lock the door was designed to prevent. (See § 449.)

In other cases the number of hazards, although limited, may be large. Thus the duty to exercise reasonable care in driving an automobile down the highway is established for the protection of the persons or property of others against all of the unreasonable possibilities of harm which may be expected to result from collisions with other vehicles, or with pedestrians, or from the driver's own automobile leaving the highway, or from narrowly averted collisions or other accidents. When harm of a kind normally to be expected as a consequence of the negligent driving results from the realization of any one of these hazards, it is within the scope of the defendant's duty of protection.

f. Harm beyond the risk. Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable. This is subject, however, to the qualification that where the harm which has resulted was itself within the risk created, the fact that it has been brought about in a manner which was not to be expected, or by the intervention of forces which were not within the risk, does not necessarily prevent the actor's liability. (See § 442B.)

Illustration:

3. A gives a loaded pistol to B, a boy of eight, to carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D.

g. Flexibility of risk. In determining whether a particular harm or hazard is within the scope of the risk created by the actor's conduct, "risk" must be understood in the broader sense of including all of those hazards and consequences which are to be regarded as normal and ordinary. "Risk" is not limited to those hazards which a reasonable man would have in contemplation and take into account in planning his conduct. Thus one who drives an automobile through city streets at excessive speed may not, as a reasonable man, have in mind the possibility that he may endanger a child in the street and that one who attempts to rescue the child may suffer harm; that he may injure some one who will suffer further injury from negligent medical treatment, or from a fall while attempting to walk on crutches; or that the injured man may be left lying in the highway, where a second car will run over him. None of these possibilities is in itself sufficient to make the driver negligent, and none of them is sufficiently probable to influence the conduct of a reasonable man in his position, which will be determined without regard to them. Nevertheless, each of them is a normal, not unusual consequence of the hazardous situation risked by the driver's conduct, and each is justly attachable to the risk created, and so within its scope.

In determining whether such events are within the risk, the courts have been compelled of necessity to resort to hindsight rather than foresight. If an event appears to have been normal, not unusual, and closely related to the danger created by the actor's original conduct, it is regarded as within the scope of the risk even though, strictly speaking, it would not have been expected by a reasonable man in the actor's place.

h. Relation to legal cause. The problem which is involved in determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause. (See §§ 443- 452.) A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter. However, in the past the courts generally have discussed the effect of intervening forces in terms of causation. The solution of the problem of determining whether the presence of an intervening force should relieve the actor from liability for harm which his conduct was a substantial factor in bringing about (see § 440) is facilitated by an appreciation of the fact that the problem is a "hazard problem" rather than a problem of causation.

i. Application to violation of statutes. The statement in Comment *e* is most easily recognized in cases of violation of legislative enactments. The language of many statutes makes it clear that they are intended to prevent a very definite type of accident or class of accidents, the prevalence of which has led to the enactment of the statute. (See § 286, Clause (c), and Illustrations.) Many acts are prohibited or required by the common law for substantially the same reason, although the fact that this is so is less easy to recognize.

j. Risk to particular interest. Conduct may be negligent because it involves an unreasonable risk of invading only a particular interest of the plaintiff, or one of a particular species of interests, such as an interest of personality, but may involve no recognizable risk of invading another interest of the same species, or an interest of another species, such as an interest in land or chattels. If so, the fact that the interest to which harm results is a different interest, or a different kind of interest, from that which was threatened with harm, will not prevent the actor from being liable, so long as the interest in fact harmed is one entitled to legal protection against negligence. Thus where harm is threatened only to the plaintiff's land, and harm results instead to his person, or vice versa, the defendant is not relieved from liability by the unexpected nature of the result, or by the fact that an interest of a different kind has been invaded. The plaintiff is not subjected to fragmentation in terms of risk or harm to his foot, his hand, his eye, his chattels, or his land.

Illustration:

4. A, negligently shooting in the street, wounds B's dog. The dog, yelping with pain, runs into B's house and collides with B in the hallway, knocking B down and injuring him. A is subject to liability to B, not only for the harm to his dog but also for the harm to his person.

Comment on Clause (c):

k. The rules which determine whether the actor's conduct is in law a cause of the invasion of another's interest are stated in §§ 430- 462.

Comment on Clause (d):

l. The rules which determine whether the other's conduct is such as to disable him from bringing an action for an invasion of which the actor's negligence is in law the cause, are stated in §§ 463- 496.

Reporter's Notes

*Clause (b):*The leading case supporting Clause (b) is Palsgraf v. Long Island R. Co. 248 N.Y. 339, 162 N.E. 99, 59 ALR 1253 (1928), the facts of which are stated in Illustration 1. Illustration 2 is given as an illustration in the dissenting opinion of Andrews, J., in that case.

The Palsgraf Case is controversial. On facts that are at all closely analogous, the decisions are few, and divided. The case has been followed, and the rule stated in Clause (b) accepted, in Dahlstrom v. Shrum, 368 Pa. 423, 84 A.2d 289 (1951), in which bus struck pedestrian and threw his body off at an angle, against plaintiff behind vehicle in position of apparent safety, and in Tucker v. Collar, 79 Ariz. 141, 285 P.2d 178 (1955), in which seller who knew machinery belt sold to tenant had ignited held not liable to landlord unless jury find that harm to landlord was a foreseeable consequence.

The Palsgraf Case is also cited and followed in two other decisions, which may perhaps be distinguished as involving superseding causes under the rules stated in §§ 440 and 442: Kane v. Burrillville Racing Ass'n, 73 R.I. 264, 54 A.2d 401 (1947), negligently hung fire extinguisher, upset by a third person, gave forth a hissing noise and caused a stampede, in which plaintiff was injured; West v. Cruz, 75 Ariz. 13, 251 P.2d 311 (1952), motorist's negligent failure to have car standing still at the curb when patrol siren sounded led to collision with convoyed automobile traveling at high speed into an intersection in the nighttime on the wrong side of the road. The case last cited also involved a statute.

On the other hand, the application of the Palsgraf Case was rejected in Jackson v. B. Lowenstein & Bros., 175 Tenn. 535, 136 S.W.2d 495 (1940), rubber mat overlapping top step of department store stairway caused injury to customer around corner below; Pfeifer v. Standard Gateway Theater, 262 Wis. 229, 55 N.W.2d 29 (1952), defendant was negligent in policing its theater, and plaintiff was hit in the eye with a spitball. The case was also disapproved, at least in dictum, in Missouri Pacific R. Co. v Johnson, 198 Ark. 1134, 133 S.W.2d 33 (1939), in which smoke from a fire on railroad right of way aggravated plaintiff's bronchitis.

Before the Palsgraf Case there were other decisions which on their facts presented the issue of the plaintiff who was beyond the recognizable risk. Where the issue was dealt with in terms of duty, some courts held that there was no duty to one to whom no harm was to be foreseen. Boyd v. City of Duluth, 126 Minn. 33, 147 N.W. 710 (1914); Goodlander Mill Co. v. Standard Oil Co., 63 F. 400, 27 L.R.A. 583 (7 Cir.1894); Trinity & B.V.R. Co. v Blackshear, 106 Tex. 515, 172 S.W. 544, L.R.A. 1915D, 278 (1915). Other courts found a duty to the unforeseeable plaintiff. Stevens v. Dudley, 56 Vt. 158 (1883); Hollidge v. Duncan, 199 Mass. 121, 85 N.E. 186, 17 L.R.A.N.S. 982 (1908); Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P. 971, 129 Am.St.Rep. 659, 16 Ann.Cas. 1189 (1909); Wilson v. Northern Pacific R. Co., 30 N.D. 456, 153 N.W. 429, L.R.A. 1915E, 991 (1915); and see Poffenbarger, J., in Bond v. Baltimore & Ohio R. Co., 82 W.Va. 557, 96 S.E. 932, 5 A.L.R. 201, 19 N.C.C.A. 674 (1918).

Most of the decisions before the Palsgraf Case treated the issue as one of "proximate" or legal causation. A few such decisions held that the unforeseeability of harm to the plaintiff prevented the harm from being "proximate." Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 A. 699, 35 L.R.A. 199, 55 Am.St.Rep. 728 (1896); Ryan v. New York Central R. Co., 35 N.Y. 210, 91 Am.Dec. 49 (1866); Hoag v. Lake Shore & M. S. R. Co., 85 Pa. 293, 27 Am.Rep. 653 (1877). The majority of them held to the contrary. Ramsey v. Carolina-Tennessee Power Co., 195 N.C. 788, 142 S.E. 861, 28 N.C.C.A. 307 (1928); Walmsley v. Rural

Restatement (Second) of Torts § 302 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 4. Types of Negligent Acts

§ 302 Risk of Direct or Indirect Harm

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either
(a) the continuous operation of a force started or continued by the act or omission, or
(b) the foreseeable action of the other, a third person, an animal, or a force of nature.

See Reporter's Notes.

Comment:

a. This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or "misfeasance" and "non-feasance," see § 314 and Comments. If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

b. A special application of Clause (b) of this Section, involving the risk of harm through the negligent or reckless conduct of others, is stated in § 302A. A second special application of Clause (b), involving the risk of the intentional or criminal conduct of others, is stated in § 302B.

c. The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it. Such continuous operation of a force set in motion by the

actor, or of a force which he fails to control, is commonly called "direct causation" by the courts, and very often the question is considered as if it were one of the mechanism of the causal sequence. In many instances, at least, the same problem may be more effectively dealt with as a matter of the negligence of the actor in the light of the risk created.

Illustrations:

1. A sets a fire on his own land, with a strong wind blowing toward B's house. Without any other negligence on the part of A, the fire escapes from A's land and burns down B's house. A may be found to be negligent toward B in setting the fire.

2. A discovers on his land a fire originating from some unknown source. Although there is a strong wind blowing toward B's house, A makes no effort to control the fire. It spreads to B's land and destroys B's house. A may be found to be negligent toward B in failing to control the fire.

d. Probability of intervening action. If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being or animal or the subsequent operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings and animals and the normal operation of natural forces in the locality in which he has intentionally created such a situation or in which he knows or should realize that his conduct is likely to create such a situation. (See § 290.) In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being or animal or a particular operation of a natural force as customary or normal, the actor is required to anticipate and provide against it. The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation. (See § 303.)

e. Meaning of "normal." The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word "normal" is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency.

Illustration:

3. A erects a swinging sign over the highway. He is required to keep it in such condition that it will not be blown down, not only by the ordinary breezes which are of everyday occurrence, but also by the gales which experience shows are likely to occur from time to time.

f. Normal conditions of nature. As stated in § 290, Comments *g* and *h*, the actor is required to recognize the fact that a certain number of animals and human beings may act in a way which is not customary for ordinary individuals, and that there are occasional operations of natural forces which are radically different from the normal. It would, however, be impracticable to set a standard of behavior so high as to require every man under all circumstances to take into account the chance of these exceptional actions and operations. Therefore, except where the actor has reason to expect the contrary, he is entitled to assume that human beings and animals will act and the natural forces will operate in their usual manner, unless their exceptional action or operation would create a serious chance of grave harm to some valuable interest and there is little utility in the actor's conduct. Thus a motorist driving along a highway is entitled to assume, unless he has special reason to expect the contrary, that other motorists will keep to the right side of the road, since motor traffic would be unduly hindered unless motorists were free to act on that assumption. On the other hand, a motorist approaching a railroad crossing is not entitled to assume that the railway company will comply with its duty to blow the whistle and ring the bell, but is required to take very great precautions to look out for trains which have not given such notice of their approach.

g. Abnormal conditions of nature. The actor is not required to anticipate or provide against conditions of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence.

Illustration:

4. In 1938 a hurricane caused serious damage in a city in New England. There is no record of any hurricane of similar force within the preceding 130 years. A, thereafter constructing a building in the city in question, is not negligent in failing to adopt an expensive method of construction which would make it safe against damage from a similar hurricane.

5. The same facts as in Illustration 4, with the additional fact that by 1957 hurricanes of similar violence have recurred four times in New England. A, constructing a building in 1957, may be found to be negligent in failing to adopt a method of construction which would make it safe against such hurricanes.

h. If the actor knows or should perceive circumstances which would lead a reasonable man to expect a particular operation of a natural force, he is required to provide against it, although, but for such circumstances, it would be so extraordinary that he would be entitled to ignore the possibility of its occurrence.

Illustration:

6. A moors his boat in a river fed by mountain streams. The moorings are sufficient to prevent the boat from being cast adrift by any stage of water likely to occur at that season of the year. A sudden cloudburst in the mountain causes an extraordinary flood which sweeps his boat away, causing it to collide with the boat of B. A may be found to be negligent if he has or should have such knowledge of the occurrence of the cloudburst as to give him reason to expect the unusual and otherwise unforeseeable flood.

i. Action of domestic animals. The actor as a reasonable man is both entitled to assume and required to expect that domestic animals will act in accordance with the nature of such animals as a class, unless he knows or should know of some circumstances which should warn him that the particular animal is likely to act in a different manner.

j. Action of human beings. As stated in § 290, the actor is required to know the common qualities and habits of other human beings, in so far as they are a matter of common knowledge in the community. The actor may have special knowledge of the qualities or habits of a particular individual, over and above the minimum which he is required to know. His act or omission may be negligent because it involves an unreasonable risk of harm to another through the intervention of conduct on the part of the other, or of third persons, which a reasonable man in the actor's position would anticipate and guard against. As to the actor's negligence where such foreseeable conduct is itself negligent, see § 302A. As to his negligence where the foreseeable conduct is intentional or criminal, see § 302B.

Reporter's Notes

This Section has been changed from the first Restatement by rewording it to include negligent omissions as well as acts. The original Comments *j* to *n* inclusive, with the accompanying Illustrations, have been shifted to Sections 302A and 302B, which involve special applications of the rule stated in this Section.

Case Citations - by Jurisdiction

C.A.2
C.A.3
C.A.4
C.A.5
C.A.6
C.A.7
C.A.8
C.A.9
C.A.10
C.A.11
D.Colo.

Restatement (Second) of Torts § 303 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 4. Types of Negligent Acts

§ 303 Acts Intended or Likely so to Affect the Conduct of the Other, a Third Person, or an Animal as to Involve Unreasonable Risk

An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.

See Reporter's Notes.

Comment:

a. The rule stated in this Section relates to a particular type of the general situation dealt with in § 302(b).

b. The act may be negligent under the rule stated in this Section because of its tendency to cause acts injurious to the other, or to prevent action necessary to his aid or protection. The latter situation is specially dealt with in § 305.

c. When actor intends to cause particular conduct. The act may be intended or likely to cause a third person to do a particular act or type of act which in itself involves an unreasonable risk even if carefully done. On the other hand, the risk may lie in the probability that the third person may conduct himself carelessly or unskillfully, or without adequate preparation or warning, in doing an act which the actor's conduct is intended or likely to cause him to do. If the actor intends to cause a third person to do a particular act in a particular manner, he is subject to liability for any harm to others caused by that act, although the third person's act is negligent or even criminal.

d. When actor does not intend to cause particular conduct. The actor may not intend the third person to act in any particular way. If so, the actor's negligence lies in the fact that he does or should realize that his conduct may cause the third person so to act, or in the further likelihood that the third person may do the act in a careless manner. In such case, the actor's negligence depends

upon the extent to which he is required to realize and take into account the tendency of mankind or of the particular person to act improperly (see § 302), or upon his knowledge of any particular likelihood that the particular person will so act. Where, as in the situations dealt with in this Section, the third person's act is done in response to the stimulus of the situation created by the defendant's conduct, there is a tendency to require the actor to realize the tendency of human beings to act improperly to a greater extent than where he creates a situation the danger of which lies in the chance of impropriety on the part of a third person in doing an act which is not so influenced by the situation created by the actor.

Illustrations:

1. An industrial parade is being held in the city of X. The A Candy Company has entered a float from which an employee from time to time throws candy into the crowd. Members of the crowd rush to gather up the candy. In so doing they trample down and cause harm to B, a small boy who is taking no part in the rush to obtain the candy. A is negligent toward B.

2. A, a weak swimmer, intentionally goes beyond his depth in a heavy surf. B, one of the crowd at the beach, goes to his assistance and, in rescuing A, suffers severe exhaustion which results in a several weeks' illness. A is negligent toward B.

3. A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.

4. A is driving along an open road. He drives so far on the wrong side of the road as to leave B, who is approaching from the opposite direction, only just enough room to pass if he drives with extreme skill. B in his terror swerves into the ditch. A is negligent toward B and the passengers in B's car.

5. A in joke throws a cannon cracker in front of an automobile which is being driven rapidly but within the speed limit. The explosion so startles B, the driver of the automobile, that he loses control of the car and swerves into a stone wall, hurting himself and the passengers. A is negligent toward B and the passengers in B's car.

e. It is common experience that a sudden fright or shock is likely to cause the person subjected to it to react to it instinctively without regard to the danger involved to himself or to others in his vicinity. The circumstances which the actor knows, or which he should recognize as likely to exist, may be such that he should realize that this instinctive reaction may involve risk to the bodily security of the other whom he subjects to the shock or to the bodily security of third persons. If so, he is negligent toward them if he intentionally subjects the other to such a shock or acts in a manner which he should recognize as involving an unreasonable risk of such a result. (See Illustration 5.)

Reporter's Notes

Illustration 1 is based on Shafer v. Keeley Ice Cream Co., 65 Utah 46, 234 P. 300, 38 A.L.R. 1523 (1925).

Restatement (Second) of Torts § 314A (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

§ 314A Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

Comment:

a. An additional relation giving rise to a similar duty is that of an employer to his employee. (See § 314B.) As to the duty to protect the employee against the conduct of third persons, see Restatement of Agency, Second, Chapter 14.

b. This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated

in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

c. The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

d. The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. (See § 302B.) It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself, as where a passenger is about to fall off a train, or has fallen. The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.

e. The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Illustrations:

1. A, a passenger on the train of B Railroad, negligently falls off of the train, and is injured. The train crew discover that he has fallen off, but do nothing to send aid to him, or to notify others to do so. A lies unconscious by the side of the track in a cold rain for several hours, as a result of which his original injuries are seriously aggravated. B Railroad is subject to liability to A for the aggravation of his injuries.

2. A, a passenger riding on the train of B Railroad, suffers an apoplectic stroke, and becomes unconscious. The train crew unreasonably assume that A is drunk, and do nothing to obtain medical assistance for him, or to turn him over at a station to those who will do so. A continues to ride on the train in an unconscious condition for five hours, during which time his illness is aggravated in a manner which proper medical attention would have avoided. B Railroad is subject to liability to A for the aggravation of his illness.

3. A is a guest in B's hotel. Without any fault on the part of B, a fire breaks out in the hotel. Although they could easily do so, B's employees fail to call A's room and warn him to leave it. As a result A is overcome by smoke and carbon monoxide before he can escape, and is seriously injured. B is subject to liability to A.

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of the store escalator. B's employees see what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

5. A, a patron attending a play in B's theatre, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonably prompt medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

6. A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

7. A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

Reporter's Notes

This Section has been added to the first Restatement.

Illustration 1 is based on Yazoo & M.V.R. Co. v. Byrd, 89 Miss. 308, 42 So. 286 (1906); Layne v. Chicago & Alton R. Co., 175 Mo.App. 34, 157 S.W. 850 (1913); Cincinnati, H. & D.R. Co. v. Kassen, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958); Continental Southern Lines, Inc. v. Robertson, 241 Miss. 796, 133 So.2d 543, 92 A.L.R.2d 653 (1961), passenger injured through his own negligence.

Illustration 2 is taken from Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192, Ann.Cas. 1916C, 856 (1915). Cf. Kambour v. Boston & Maine R. Co., 77 N.H. 33, 86 A. 624, 45 L.R.A. N.S. 1188 (1913); Jones v. New York Central R. Co., 4 App.Div.2d 967, 168 N.Y.S.2d 927 (1957), affirmed, 4 N.Y.2d 963, 177 N.Y.S.2d 492, 152 N.E.2d 519 (1958); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958).

Compare, as to the duty of a carrier to protect its passengers from dangers arising from the conduct of third persons: Hillman v. Georgia Ry. & Banking Co., 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222 (1906); Nute v. Boston & Maine R. Co., 214 Mass. 184,

Restatement (Second) of Torts § 315 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment:

a. The rule stated in this Section is a special application of the general rule stated in § 314.

b. Distinction between duty to act for another's protection and duty to act for self-protection. In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person's car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other's danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver's attention to the road, he would give the driver an opportunity to stop the car before the other is run over. On the other hand, under the rule stated in § 495, the actor is guilty of contributory negligence if he fails to exercise an ability which he in fact has to control the conduct of any third person, where a reasonable man would realize that the exercise of his control is necessary to his own safety. Thus if the actor, while riding merely as a guest, does not warn the driver of a danger of which he knows and of which he has every reason to

believe that the driver is unaware, he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor himself is injured.

Comment on Clauses (a) and (b):

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316- 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

Case Citations - by Jurisdiction

U.S.
C.A.1
C.A.3
C.A.4
C.A.6
C.A.7
C.A.8
C.A.9,
C.A.9
C.A.10,
C.A.10
C.A.11
C.A.D.C.
C.A.Fed.
N.D.Ala.
D.Colo.
D.Conn.
D.Del.
D.D.C.
M.D.Fla.
S.D.Fla.
S.D.Fla.Bkrtcy.Ct.
M.D.Ga.
S.D.Ga.
D.Hawaii,
D.Hawaii
D.Idaho,
D.Idaho
C.D.Ill.
N.D.Ill.
N.D.Ind.
N.D.Iowa
S.D.Iowa,
S.D.Iowa
D.Kan.
E.D.Ky.

Restatement (Second) of Torts § 320 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 320 Duty of Person Having Custody of Another to Control Conduct of Third Persons

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

See Reporter's Notes.

Comment:

a. The rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

b. Helplessness of other. The circumstances under which the custody of another is taken and maintained may be such as to deprive him of his normal ability to defend himself, or to deprive him of the protection of someone who, if present, would be under a duty to protect him, or though under no such duty would be likely to do so. Thus the fact that a prisoner is handcuffed may make him incapable of defending himself against an attack, which he could otherwise have done. The very fact of imprisonment prevents a prisoner from avoiding attacks by flight. So too, a child while in school is deprived of the protection of his parents

or guardian. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.

c. Peculiar risks to which other exposed. The custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of notoriously dangerous character, but also deprives the person in custody of his normal ability to protect himself, as where a prisoner is put in a cell with a man of known violent temper, or is required to work or take exercise with a group of notoriously desperate characters. In such a case, the fact that the person in custody is a prisoner precludes the possession of any self-defensive weapons, and thus makes him incapable of adequately protecting himself.

d. Duty to anticipate danger. One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it. Thus if a sheriff or peace officer knows that public opinion is so violently incensed against his prisoner that there is danger of mob violence, he may be required not only to himself to defend the prisoner, but also to exercise reasonable care to secure assistance which will enable him to do so effectively. So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor is or is not under a duty to take custody of the other.

Reporter's Notes

As to the duty of one who has taken charge of another to protect him by controlling the conduct of third persons, see People ex. rel. Coover v. Guthner, 105 Colo. 37, 94 P.2d 699 (1939); Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928); Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940); Honeycutt v. Bass, 187 So. 848 (La.App.1939); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); Hixon v. Cupp, 5 Okla. 545, 49 P. 927 (1897); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Browning v. Graves, 152 S.W.2d 515 (Tex.Civ.App.1941), error refused; Kusah v. McCorkle, 100 Wash. 318, 170 P. 1023, L.R.A. 1918C, 1158 (1918); Eberhart v. Murphy, 110 Wash. 158, 188 P. 17 (1920), reversed on other grounds, 113 Wash. 449, 194 P. 415.

Case Citations - by Jurisdiction

U.S.
C.A.1
C.A.3
C.A.4
C.A.7
C.A.8
C.A.9
C.A.10
E.D.Ark.
D.Colo.
S.D.Fla.Bkrtcy.Ct.
E.D.Ill.
N.D.Ind.

Restatement (Second) of Torts § 323 (1965)

Restatement of the Law - Torts October 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title B. Duty to Aid Others and Services Gratuitously Rendered or Undertaken

§ 323 Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether:

(1) the making of a contract, or a gratuitous promise, without in any way entering upon performance, is a sufficient undertaking to result in liability under the rule stated in this Section, or

(2) there may not be other situations in which one may be liable where he has entered upon performance, and cannot withdraw from his undertaking without leaving an unreasonable risk of serious harm to the other.

Comment:

a. This Section applies to any undertaking to render services to another which the defendant should recognize as necessary for the protection of the other's person or things. It applies whether the harm to the other or his things results from the defendant's negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it. It applies both to undertakings for a consideration, and to those which are gratuitous. As to whether a mere promise, without entering upon performance, is a sufficient undertaking within the rule stated in this Section, see Comment *d* below.

A special application of the rule stated, to one who takes charge of another who is helpless at the time, is stated in § 324. See also, as to undertakings by a servant, Restatement of Agency, Second, §§ 354 and 378.

b. Skill and competence. One who gratuitously gives transportation to another, or otherwise renders gratuitous services to him, is not subject to liability to him for his failure to have the competence or to exercise the skill normally required of persons doing such acts, if the other who accepts the services is aware, through information given by the actor or otherwise, of his incompetence. However, a contract to render services, or a gratuitous offer to render them, or even merely giving them at the other's request, may carry with it a profession or representation of some skill and competence; and if the actor realizes or should realize that his competence and skill are subnormal, he must exercise reasonable care to inform the other. If he does not do so, he is subject to liability for physical harm resulting from his deficiencies. There are situations in which it is socially desirable, and so legally permissible, to give gratuitous aid even though the person who gives it realizes that his lack of competence and skill creates some degree of risk, and the person receiving the aid is unconscious or otherwise incapable of deciding whether to accept or to reject the assistance. Thus one who finds another in some lonely place severely wounded, unconscious, and in urgent need of first aid treatment may, without fear of liability, do the best he can although he realizes that he has not that knowledge of the technique of first aid which is necessary to make it certain that his efforts will be beneficial rather than harmful. On the other hand, the actor's incompetence to deal with the situation may be so extreme as to make it unreasonable for him to attempt to give assistance.

c. Termination of services. The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. His motives in discontinuing the services are immaterial. It is not necessary for him to justify his failure to continue the services by proving a privilege to do so, based upon his private concerns which would suffer from the continuance of the service. He may without liability discontinue the services through mere caprice, or because of personal dislike or enmity toward the other.

Where, however, the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated.

Illustration:

1. A, an employee of B Company, complains to the manager of the Company that she is ill, and asks that she be sent home. She is sent home in one of the Company's delivery wagons. The street leading to A's house is rough and unpaved, and although it is raining, the driver refuses to go further, and tells A to get out and walk the rest of the distance, as a result of which her illness is increased. B Company is subject to liability for the increase in A's illness caused by her exertion and her exposure to the rainy weather.

Comment on Caveat:

d. Promise as an undertaking. The Caveat leaves open the question whether a mere promise, without in any way entering upon performance, is an undertaking sufficient to make the promisor liable under the rule stated in this Section.

The early development of the law, and particularly of the forms of action of case and assumpsit, led to a distinction, as to tort liability, between "misfeasance" and "non-feasance." A defendant who actually entered upon the performance of his undertaking became liable, in an action on the case, for harm to the plaintiff which resulted from his negligent performance, whereas one who never commenced performance at all was not liable in such an action for his failure to do so. The mere breach of a promise, without more, was regarded as "non-feasance," for which any action must be in assumpsit, upon the contract and upon proof of a consideration for the promise, rather than on the case under any theory of tort liability.

This distinction has persisted to the present day, largely in cases involving questions of pleading. Decisions in a number of jurisdictions, holding that the breach of a promise can give rise only to a contract action, and does not result in liability in tort, have not been overruled. The modern law has, however, witnessed a considerable weakening and blurring of the distinction, in situations where the plaintiff's reliance upon the defendant's promise has resulted in harm to him. Through the development of the doctrine of "promissory estoppel" the contract rule itself has been considerably modified to permit, in many situations, the enforcement of a promise made without consideration. See Restatement of Contracts, § 90.

Where the plaintiff's reliance has led to his harm, the courts have tended to seize upon almost any trivial and technical conduct of the defendant, to find that he has commenced performance of his promise, and so has "entered upon" his undertaking. Thus the defendant is held liable where he has merely received a document, written a letter, appeared on the first day of a long employment, or accepted a general agency, although such acts themselves have played no part in inducing the plaintiff's reliance or in causing the harm to him.

There is no essential reason why the breach of a promise which has induced reliance and so caused harm should not be actionable in tort. This is true particularly where the harm is physical harm, to the person, land, or chattels of the plaintiff. The technicalities to which the courts have resorted in finding some commencement of performance indicate a development of the law toward such liability. In the absence of sufficient decisions, however, the question is left open.

e. Other situations. The Caveat also leaves open the question whether there may not be cases in which one who has entered on performance of his undertaking, and cannot withdraw from it without leaving an unreasonable risk of serious harm to another, may be subject to liability even though his conduct has induced no reliance and he has in no way increased the risk. Clear authority is lacking, but it is possible that a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable even though there were no other possible sources of aid, and the situation is made no worse than it was.

Reporter's Notes

This Section has been changed from the first Restatement by rewording it in terms of an "undertaking" to render services, in order to leave open the Caveat, which has been added to the Section.

Clause (a) is supported by the following cases, among others:

Restatement (Third) of Torts: Phys. & Emot. Harm § 42 (2012)

Restatement of the Law - Torts October 2020 Update

Restatement (Third) of Torts: Liability for Physical and Emotional Harm

Chapter 7. Affirmative Duties

§ 42 Duty Based on Undertaking

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

Comment:

a. History. Liability for negligently conducting a gratuitous undertaking has a history that dates back to the early 18th century. Section 323 of the Restatement of Torts addressed the liability of Good Samaritans. Section 323 required only that the actor employ skills actually possessed. A person acting gratuitously for the protection of another who discontinued those services was subject to liability only if the other was left in a worse position than if the aid had not been provided. Section 323 did not predicate the duty on reliance or an increase in risk. Section 325 of the first Restatement imposed an affirmative duty based on a promise to engage in an undertaking but required reasonable reliance.

The Second Restatement of Torts substantially expanded the scope of § 323 beyond Good Samaritans by including persons who act pursuant to a contract. This Section, while eliminating language specifically identifying those acting gratuitously and those acting for consideration, applies to both.

The Second Restatement imposed a duty of reasonable care in conducting the undertaking and eliminated a separate standard for discontinuing the undertaking. It further required that the actor increase the risk of harm or that the harm be a consequence of reliance (a specific instance of increasing the risk). This Section, which retains the core features of § 323, replaces it.

Section 323 limited liability for breach of the duty it imposed to physical harm, as does this Section, Chapter, and Restatement.

b. Court determinations of no duty based on special problems of principle or policy. Even though an affirmative duty might exist pursuant to this Section, a court may decide, based on special problems of principle or policy, that no duty or a duty other than reasonable care exists. See § 7(b).

c. Ordinary duty of reasonable care and affirmative duty based on undertaking. An actor who engages in an undertaking is subject to the ordinary duty of reasonable care provided in § 7 for risks created by the undertaking. In that case, no inquiry into affirmative duties is necessary. This Section, by contrast, addresses an actor's liability for harm arising from other risks when the actor undertakes to eliminate or ameliorate those risks.

Illustrations:

1. Caryn and David purchase a new natural-gas furnace for their home. They hire Jillian to install the furnace, and she does so. She does not follow the manufacturer's minimum requirements for venting the furnace, and as a result, both Caryn and David suffer carbon-monoxide poisoning. Danielle, their friend, finds them unconscious in their home due to the carbon-monoxide poisoning. Danielle drags them to another room but does not call for help. Caryn and David suffer harm that could have been avoided if Danielle had summoned help. Whether Danielle is subject to a duty to Caryn and David for harm that could have been avoided is governed by this Section, not § 7, because Danielle's conduct did not itself create the risk that caused the harm.

2. Same facts as described in Illustration 1. Jillian owes a duty of reasonable care as provided in § 7 to Caryn and David for the harm due to carbon-monoxide poisoning, without reference to this Section, because Jillian's conduct in installing the furnace created the risk that caused harm to Caryn and David.

The duty provided in this Section is one of reasonable care. It may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance). See § 37, Comment *c*. Courts sometimes imply that, if an undertaking duty exists, the defendant is liable for the harm. This improperly conflates the questions of duty and of breach. Even when a duty exists under this Section, an actor is subject to liability only for a failure to exercise reasonable care.

d. Threshold for an undertaking. An undertaking entails an actor voluntarily rendering a service, gratuitously or pursuant to contract, on behalf of another. The undertaking may be on behalf of a specific individual or a class of persons. The actor's knowledge that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this Section. The actor need not act for the purpose of protecting the other; this Section is equally applicable to those who act altruistically and to those who act nonaltruistically, as is often the case when an undertaking is the result of a contractual arrangement. While knowledge that the undertaking will reduce the risk of harm to another is necessary for the existence of an undertaking, knowledge that the other will rely on the undertaking is not.

When underlying facts are in dispute, the question of whether a duty exists must be submitted to the factfinder with appropriate alternative instructions.

e. Promises as undertakings. The Restatement Second of Torts § 323, Comment *d*, left open the question of whether a promise, without further action, constituted an undertaking. It located the historical reluctance to impose liability when performance had not begun as rooted in both the distinction between misfeasance and nonfeasance, see § 37, Comment *c*, and the common-law pleading rules that relegated claims involving nonperformance to assumpsit. The Second Restatement left the matter open, while endorsing the idea that a promise should be sufficient to constitute an undertaking and observing that courts had been quite lenient in finding that an undertaking had commenced.

The Second Restatement's reluctance to impose liability based on gratuitous promises stems from Thorne v. Deas, 4 Johns. 84 (N.Y. 1809). The defendant there failed to obtain insurance to cover a vessel that he co-owned with the plaintiff, despite a promise to do so. Based on Roman law, the court concluded that the only basis for liability was in an action in case because contract claims required consideration. An action in case was available only for misfeasance; nonfeasance would not suffice. Since the defendant in *Thorne* had failed to act at all, rather than having taken some affirmative steps toward obtaining insurance, the nonfeasance rule barred the claim. Thus, *Thorne* reasoned circularly that there was no exception to the no-duty-to-rescue rule in the case of an undertaking limited to a gratuitous promise because of the no-duty-to-rescue rule.

Contract law has since recognized promissory estoppel, which enforces breaches of gratuitous promises based on reasonable reliance. See Restatement Second, Contracts § 90. Moreover, *Thorne* involved economic loss rather than physical harm. If contract law provides a remedy for mere promises, tort law should also do so when breach of the promise causes personal injury or property damage. The crux of a duty based on a promise is that the actor engage in behavior that leads another to forgo available alternatives for protection. Whether that behavior consists of action or a promise should not matter. Thus, this Section revives the rule in § 325 of the first Restatement of Torts by recognizing that a promise without any action in furtherance of it is an undertaking subject to the rule stated in this Section.

f. Increasing the risk of harm. The requirement that the actor increase the risk of harm means that the risk to the other person is increased beyond that which existed in the absence of the actor's undertaking.

This requirement is often met because the plaintiff or another relied on the actor's performing the undertaking in a nonnegligent manner and declined to pursue an alternative means for protection. Although reliance is merely a specific manner of increasing the risk of harm to another, this Section retains reliance as a separate basis for imposing a duty because historically it has been treated separately.

Illustration:

3. Ahmed's neighbor, Meena, agrees to make daily visits to Ahmed's house to care for Ahmed's cat and dog while he is out of town. Meena forgets to do so. Meena owes a duty of reasonable care to Ahmed because he relied on Meena to attend to his pets. Meena is subject to liability for harm caused by her negligent failure to visit Ahmed's home and attend to his pets.

The Restatement Second of Torts § 323, Comment *e*, left open the question of whether increased risk or reliance might not be required to impose a duty on some actors engaged in undertakings. Many undertakings cases decided since the Second Restatement pose this issue, but none explicitly addresses the question. No apparent pattern exists to the cases except that when

the undertaking is a promise, reliance is required. In the absence of an identifiable trend, this Restatement takes no position on whether a court might dispense with the increased-risk or reliance requirement in some undertakings cases.

g. Scope of the undertaking. In some cases, a question arises about whether the risk that caused the harm or the actor's negligence (typically an omission), was within the scope of the undertaking. The scope of an undertaking can be determined only from the facts and circumstances of the case. When reasonable minds can differ about whether the risk or negligence was within the scope of the undertaking, it is a question of fact for the factfinder.

Illustrations:

4. Lindsay hires Margaret to fix a leaking plumbing fixture in a second-floor apartment. Margaret repairs the leak in a nonnegligent manner. After completing the repairs, Margaret realizes that water that had leaked earlier from the fixture then had run from the apartment onto an adjacent alley. When returning home that evening, Lindsay slips and falls on ice that formed in the alley from the runoff. Lindsay sues Margaret, claiming that she had a duty of reasonable care with regard to the water that leaked out of the fixture. The risks posed by the water that had previously escaped from the fixture are beyond the scope of Margaret's undertaking to repair the fixture as a matter of law, and Margaret is not subject to liability for Lindsay's harm.

5. The River City School District provides school crossing guards at the three most dangerous intersections for each school in the district. While walking to school and crossing one of those intersections, Alphonso, a seven-year-old, is hit by an automobile and injured because no crossing guard is present. Alphonso's guardian sues the School District, claiming that its negligence caused Alphonso's harm. The duty of the School District encompasses reasonable care at the intersection at which Alphonso was injured, as a matter of law, and the School District is subject to liability for Alphonso's harm.

Acts that comprise an undertaking are often ambiguous with respect to the scope of the undertaking. When reliance is the basis for the increased risk, fairness suggests that the scope of the undertaking be interpreted from the perspective of those who might reasonably have relied on the undertaking. When an undertaking involves a promise, the promise might provide probative evidence about the scope of the undertaking.

h. Termination. While an actor who engages in a gratuitous undertaking need not continue the undertaking indefinitely, the actor may not unreasonably terminate the undertaking. In most nonemergency, gratuitous undertakings, providing reasonable notice that the actor is terminating the undertaking suffices. Notice of termination is also probative on the question of reliance.

Illustration:

6. The Longhorn School District opens a new elementary school, but because of budgetary constraints does not provide school crossing guards for pupils. Keith, a stay-at-home father, takes on crossing duties for his daughter

and other children from his neighborhood. Keith continues his volunteer duties for several months, thereby leading other parents to the reasonable impression that the scope of his undertaking was to continue at least for the school year. Because of Keith's undertaking and their understanding of its scope, other parents permit their children to walk to and from school unattended. One such child is Zachary. Keith eventually becomes tired of his efforts and, without notifying other parents, ceases attending to the crossing. Because of this, Zachary is hit by a car while walking home from school. Keith has a duty of reasonable care with regard to his crossing undertaking, including a duty of reasonable care in connection with the termination of his undertaking.

i. Undertakings to provide public utilities. Similar to their reluctance to impose affirmative duties on government entities, see § 37, Comment *i*, courts have been reluctant to impose tort duties on providers of public utilities. This concern originates in Judge Cardozo's opinion in Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928), a decision sufficiently ambiguous that it can be read as relying on a no-duty-to-rescue rationale. That is, utilities have no duty to provide their services, and the cessation of service, regardless of the reason, is merely a return to the status quo ante. The difficulty with that view is that the provision of utilities creates an expectation of and reliance on continued service. When the utility ceases to supply service, the omission is much like ceasing to provide warning signals at a railroad crossing. Put another way, reliance on the utility's continuing to provide its services is a cause of the harm. Moreover, the policies supporting the no-duty-to-rescue rule, see § 37, Comment *e*, do not apply to a commercial enterprise that is engaged in the business of supplying services to customers.

The better explanation for limitations on the duty of public utilities, also expressed in *Moch*, is concern about the huge magnitude of liability to which a utility might be exposed from a single failure to provide service that affects hundreds, thousands, or, in the case of an electrical blackout, millions of people. In addition, when the harm is property damage, often the plaintiff will have first-party insurance that covers the loss. Leaving the loss to be covered by first-party insurance avoids the substantial transactional costs of a subrogation claim by a first-party insurer against a liability insurer. On the other hand, deterrence is compromised by not placing these losses on the only party with an opportunity to prevent them. More recent limitations on the duty of public utilities found in some public-utility tariffs rely on deterrence and on appropriate sources of insurance rather than on policies that support the no-duty rule in § 37. Regardless of the source, the reasons for finding that a utility has no duty when it negligently fails to provide service are best derived from the principles and policies employed in no-duty determinations, see § 7, and not the special considerations that justify the no-duty-to-rescue rule in § 37.

j. Legislative modification of the duty of Good Samaritans. A substantial number of states have statutes that modify the common-law duty of Good Samaritans. Some are limited to specific categories of Good Samaritans, such as physicians. They often are limited to emergency undertakings, which are addressed more specifically in § 44.

k. Lost-opportunity and lost-chance claims. This Section addresses the question of duty. It does not address claims based on a lost opportunity or lost chance of recovery. See § 26, Comment *n*.

Reporters' Note

Comment a. History. Coggs v. Bernard, (1703) 92 Eng. Rep. 107 (K.B.), is credited as recognizing an affirmative duty based on a gratuitous bailment. Lord Holt grounded the obligation in misrepresentation, explaining that, implicit in the undertaking to take care of the goods, is a representation that the bailee will exercise care, and the reliance of the bailor constitutes adequate consideration for the obligation imposed on the bailee. See also Shells v. Blackburn, (1789) 126 Eng. Rep. 94, 96 (C.P.) (reversing judgment for plaintiff who had relied on another to take appropriate steps to export leather, on grounds that gratuitous bailee who had no special skills need only avoid gross negligence); Skelton v. London & Nw. Ry. Co., (1867) 2 L.R.C.P. 631,

CERTIFICATE OF SERVICE

I hereby certify that on January 25th, 2021, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

Counsel for Turner:

Philip Talmadge, WSBA # 6973
Gary Manca, WSBA # 42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
phil@tal-fitzlaw.com
gary@tal-fitzlaw.com

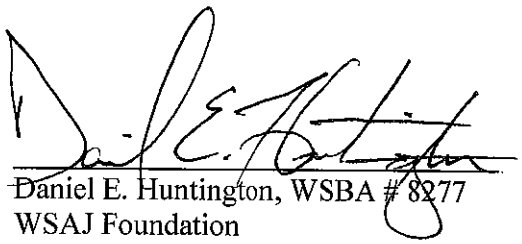
Brad J. Moore, WSBA # 21802
Brian F. Ladenburg, WSBA # 29531
A. Melanie Nguyen, WSBA # 51724
Stritmatter Kessler Koehler Moore
3600 15th Avenue W # 300
Seattle, WA 98119
(206) 448-1777
brad@stritmatter.com
brian@stritmatter.com

Counsel for DSHS:

Joseph M. Diaz, WSBA # 16170
Assistant Attorney General
1250 Pacific Avenue, Suite 105
Tacoma, WA 98401
(253) 593-6138
joseph.diaz@atg.wa.gov

Counsel for LMT:

Christopher J. Kerley, WSBA # 16489
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Suite 250
Spokane, WA 99201
(509) 455-5200
ckerley@ecl-law.com



Daniel E. Huntington, WSBA # 8277
WSAJ Foundation

From:	OFFICE RECEPTIONIST, CLERK
To:	"Valerie McOmie"
Cc:	Phil Talmadge; Gary Manca; brad@stritmatter.com; Brian Ladenburg; joseph.diaz@atg.gov; ckerley@ecl-law.com; Dan Huntington
Subject:	RE: Turner v. State, Supreme Court Case # 99243-6
Date:	Monday, January 25, 2021 3:50:36 PM

Received 1-25-2021

From: Valerie McOmie [mailto:valeriemcomie@gmail.com]
Sent: Monday, January 25, 2021 3:45 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Phil Talmadge <phil@tal-fitzlaw.com>; Gary Manca <Gary@tal-fitzlaw.com>; brad@stritmatter.com; Brian Ladenburg <Brian@stritmatter.com>; joseph.diaz@atg.gov; ckerley@ecl-law.com; Dan Huntington <danhuntington@richter-wimberley.com>
Subject: Turner v. State, Supreme Court Case # 99243-6

Dear Court Clerk:

Per direction from the Clerk of the Court, due to technical issues with the Washington Appellate Courts Portal, please find attached to this email the Motion for Leave to File Amicus Curiae Brief and accompanying Amicus Curiae Brief on behalf of Washington State Association for Justice Foundation in the above-referenced case. Counsel for the parties are being served simultaneously by copy of this email.

Respectfully submitted,

Valerie McOmie
Amicus Co-Coordinator
On behalf of WSAJ Foundation
4549 NW Aspen Street
Camas, WA 98607
Tel. (360) 852-3332
valeriemcomie@gmail.com